IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JAMES W. MENEFEE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.: 2:17-cv-262-WC
	)	
SANDERS LEAD COMPANY, INC.,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER[1]

Plaintiff James W. Menefee brings this action against Defendant Sanders Lead Company, Inc. ("SLC"), alleging age discrimination pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and the Alabama Age Discrimination in Employment Act ("AADEA"), Ala. Code § 25-1-20 *et seq*. *See* Doc. 1.[2] Plaintiff was hired by Defendant in 1989 and terminated in October 2015. At the time of his termination, Plaintiff was the manager of the Defendant's slag department. This lawsuit concerns allegations of age discrimination as related to Plaintiff's termination.

This cause is presently before the court on Defendant's motion for summary judgment. *See* Doc. 19. Plaintiff filed a response in opposition to the motion, *see* Doc. 22,

[1] The parties consented to final dispositive jurisdiction by a Magistrate Judge pursuant to 28 U.S.C. § 636(c). *See* Docs. 11 & 12.

[2] References herein to "Doc. __" are to the document numbers assigned to the pleadings, motions, and other materials, as reflected on the docket.

and Defendant replied, *see* Doc. 24. Upon review of the motion and the record, the court concludes that Defendant's motion for summary judgment is due to be granted.

SUMMARY JUDGMENT STANDARD

A movant is entitled to summary judgment if he "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). For summary judgment purposes, an issue of fact is "material" if, under the substantive law governing the claim, its presence or absence might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the movant fails to satisfy its initial burden, the motion for summary judgment will be denied. *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1300 (11th Cir. 2012). If the movant adequately supports its motion, the burden shifts to the opposing party to establish — "by producing affidavits or other relevant and admissible evidence beyond the pleadings" — specific facts raising a genuine issue for trial. *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1315 (11th Cir. 2011); *Dietz v. Smithkline Beecham Corp.*, 598 F.3d 812, 815 (11th Cir. 2010); Fed. R. Civ. P. 56(c)(1)(A). "All affidavits [and declarations] must be based on personal knowledge and must set forth facts that would be admissible under the Federal Rules of Evidence[.]" *Josendis*, F.3d at 1315; Fed. R. Civ. P. 56(c)(4).

The court views the evidence and all reasonable factual inferences in the light most favorable to the nonmovant. *Miller's Ale House, Inc. v. Boynton Carolina Ale House, LLC*, 702 F.3d 1312, 1316 (11th Cir. 2012). However, "[i]f no reasonable jury could return a verdict in favor of the nonmoving party, there is no genuine issue of material fact and

summary judgment will be granted." *Morton v. Kirkwood*, 707 F.3d 1276, 1284 (11th Cir. 2013) (citation omitted) (internal quotation marks omitted).

BACKGROUND AND RELEVANT FACTS[3]

I. Plaintiff's Employment at SLC

SLC is a corporation engaged in the treatment of lead-contaminated materials. *See* Doc 19-1 at 7. The slag department's manager is primarily responsible for the day-to-day operations and production related to the treatment of these lead-contaminated materials. *Id.* The manager is also responsible for the supervision of the department's personnel and the upkeep of its equipment. Doc. 19-4 at 29.

Plaintiff was born in 1953. Doc. 22 at 1. He began working at SLC in 1989 as a foreman. Doc. 22 at 1–2. In June or July 2015, he was appointed manager of the slag department. Doc. 22 at 2. And in October 2015, he was fired by Defendant. Doc. 22 at 4.

II. Plaintiff's 2008 Disciplinary Incident

On January 8, 2008, a meeting was held in order to discuss Plaintiff's poor management and its detrimental effect on the slag department. *See* Doc. 19-5 at 2–3. Bart Sanders, Defendant's vice president of operations, attended the meeting where it was made

[3] As is required, the court has viewed the evidence presented on the motion for summary judgment in the light most favorable to the plaintiff. *Welch v. Celotex Corp.*, 951 F.2d 1235, 1237 (11th Cir. 1992). These are the facts for summary judgment purposes only. They may or may not be the actual facts that could be proven at trial. *See Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1400 (11th Cir. 1994) ("[W]hat we state as 'facts' in this opinion for purposes of reviewing the rulings on the summary judgment motion [ ] may not be the actual facts.") (citation and marks omitted). Also, the facts set out herein are derived from the parties' evidentiary submissions and the court's own examination of the record; they are not taken from counsels' unsubstantiated statements in the parties' briefs. "Statements by counsel in briefs are not evidence." *Skyline Corp. v. N.L.R.B.*, 613 F.2d 1328, 1336 (5th Cir. 1980). *See also Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. 1981) (holding that decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981, are binding in the Eleventh Circuit).

clear that Plaintiff had one last chance to improve his management of the slag department by, among other things, better disciplining his employees and being more attentive to preventative maintenance issues. *See* Doc. 19-5 at 2–3. As a result of this meeting and incident report, Plaintiff was demoted and Mark Kilpatrick took over the slag department. *See* Doc. 19-4 at 25. According to Bart Sanders, under Kilpatrick's leadership, the slag department went through an "absolutely unbelievable change" and became "one of the best places to work." *See* Doc. 19-4 at 25–26. Bart Sanders cited this 2008 disciplinary incident as a factor in Plaintiff's firing in 2015. *See* Doc. 19-4 at 26.

III. Plaintiff's Job Performance and Termination

Following Kilpatrick's move to another department, in approximately June or July of 2015, Plaintiff was reinstated as the slag department's manager. *See* Doc. 19-1 at 6–7. Then, in approximately September 2015, during a routine compliance inspection, SLC's safety department uncovered evidence that someone had been smoking cigarettes and sleeping in an area behind the slag plant. *See* Doc. 19-6 at 3. In order to expose the source of this evidence, Will Sanders, SLC's battery operations manager, decided to install a small video camera. *See* Docs. 23-7 at 5 & 19-6 at 4. The video recording showed Plaintiff smoking in the work area. *See* Doc. 19-6 at 5. Plaintiff admitted that he smoked in the work area and that he knew of many other members of the slag department that did the same. *See* Doc. 19-1 at 12–14. Plaintiff avers that he failed to reprimand his subordinates for smoking because, as a smoker himself, he felt sympathy towards them. *See* Doc. 19-1 at 14.

Pending an investigation, Plaintiff was subsequently suspended. *See* Doc. 23-8 at 34. The investigation, which included interviews of Plaintiff, was conducted primarily by Bart Sanders. *See* Doc. 23-8 at 34. Then, on October 1, 2015, Plaintiff's employment was terminated. *See* Doc. 22 at 4. According to Bart Sanders, Plaintiff was fired because he jeopardized his health by smoking, he jeopardized the health of his employees by permitting them to smoke, he covered up his employees' smoking, and he mismanaged his department, partially exemplified by the 2008 disciplinary incident. *See* Doc. 19-4 at 20–26. According to Plaintiff, Bart Sanders told him that he was fired due to his smoking. Doc. 23-1 at 46. Plaintiff contends that Bart Sanders asked him about his age on the day of his termination, as well as previously. Doc. 23-1 at 52.

IV. SLC's Slag Department After Plaintiff's Termination

Following Plaintiff's firing, Bart Sanders reinstated Kilpatrick as the slag department's manager. Doc. 19-4 at 5. According to Kilpatrick, he was responsible for almost everything related to the slag department's management. Doc. 19-11 at 8–9. Kilpatrick further averred that Aaron Bryan shared limited responsibilities with him, such as "work[ing] the guys." Doc. 19-11 at 8. Bart Sanders also testified that Kilpatrick replaced Plaintiff as the slag department's manager. Doc. 23-8 at 7. Kilpatrick was born in 1965. Doc. 23-5 at 4. Bryan was born in 1993. Doc. 23-3 at 3.

V. Plaintiff's Lawsuit Against SLC

In April 2017, Plaintiff filed this lawsuit. The Complaint contains the following claim of violation of the ADEA and the AADEA[4] against Defendant[5]: (1) Defendant fired Plaintiff because of his age. This court will now address Plaintiff's sole claim.[6]

DISCUSSION

1. Discriminatory Termination Claim

Plaintiff claims that Defendant terminated his employment because of his age, in violation of the ADEA and the AADEA. Because both parties concede that there is no direct evidence of discrimination, Plaintiff's claim turns on the traditional *McDonnell Douglas* burden-shifting analysis. *See Chapman v. AI Transp.*, 229 F.3d 1012, 1024 (11th

[4] Plaintiff has asserted his claims under both the ADEA and the AADEA. As a general proposition, a claim under the AADEA is analyzed under the same evidentiary framework as one made under the ADEA. *See Robinson v. Ala. Cent. Credit Union*, 964 So. 2d 1225, 1228 (Ala. 2007). Therefore, this court will not discuss each claim separately.

[5] Defendant argues that Plaintiff's ADEA and AADEA claims are duplicative and that this court should dismiss Plaintiff's AADEA claim. *See* Doc. 19 at 7–8. Consistent with this court's ruling in prior cases, the undersigned declines to dismiss Plaintiff's AADEA claim as duplicative. *See Wallace v. Jim Walter Homes, Inc.*, 68 F. Supp. 2d 1303, 1303–04 (M.D. Ala. 1999) ("The dismissal provision [of the AADEA] thus operates to conserve the judicial resources of Alabama state courts, not to make claims unavailable for simultaneous pursuit in a single forum."); *See also McDowell v. Massey Auto*, 2017 WL 2624226, at *14 (M.D. Ala. May 15, 2017), *report and recommendation adopted*, 2017 WL 2625125 (M.D. Ala. June 16, 2017); *Redmon v. Auto*, 2014 WL 4855023, at *11 (M.D. Ala. Sept. 29, 2014) (reasoning that because the AADEA's "[e]lection of remedies" provision is "directed [at] the issue of duplicative federal and state age discrimination lawsuits", and does not address ADEA and AADEA claims in the same lawsuit, the court declines to dismiss plaintiff's AADEA claim).

[6] Plaintiff does not appear to make a claim in the complaint for disparate treatment discrimination under the ADEA. *See* Doc. 1. Defendant nevertheless argues against such a claim. *See* Doc. 19 at 18–23. However, because this claim is not pled in the Complaint, it is not before the court. Pursuant to Federal Rule of Civil Procedure 8(a), a plaintiff's complaint or amendments thereto must set out the plaintiff's claims for relief. Nevertheless, the court has considered this purported claim on its merits and, based on the same reasons discussed *infra* concerning the other claim, it arrives at the same conclusion. Namely, Plaintiff cannot show that Defendant's proffered reasons are pretextual. Defendant is thus entitled to summary judgment on Plaintiff's purported disparate treatment claim.

Cir. 2000) (applying *McDonnell Douglas* to evaluate ADEA claims); *Mauter v. Hardy Corp.*, 825 F.2d 1554, 1556 (11th Cir. 1987) (same).

A. Prima Facie Case

Under *McDonnell Douglas*, a plaintiff must first establish a *prima facie* case of discrimination, which "in effect creates a presumption that the employer unlawfully discriminated against the employee." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981). To establish a *prima facie* case of age discrimination, a plaintiff must show four things: "that he (1) was a member of a protected age group, (2) was subjected to adverse employment action, (3) was qualified to do the job, and (4) was replaced by or otherwise lost a position to a younger individual." *Chapman,* 229 F.3d at 1024.

If the plaintiff establishes a *prima facie* case of discrimination, the "burden shifts to the employer to rebut the presumption of discrimination with evidence of a legitimate, nondiscriminatory reason for the adverse employment action." *Kragor v. Takeda Pharmaceuticals America, Inc.*, 702 F.3d 1304, 1308 (11th Cir. 2012). "If the employer meets its burden of production, the presumption of discrimination raised by the plaintiff's *prima facie* case is rebutted and thus disappears. Once the presumption of discrimination is rebutted, the inquiry proceeds to a new level of specificity, whereby the plaintiff must show the employer's proffered reason to be a pretext for unlawful discrimination." *Smith v. Lockheed–Martin Corp.,* 644 F.3d 1321, 1325–26 (11th Cir. 2011) (citations and internal quotation marks omitted).

In the end, a plaintiff must show that the discriminatory reason was the but-for cause of the adverse employment action. *Godwin v. WellStar Health Sys., Inc.*, 615 F. Appx. 518,

527 (11th Cir. 2015) (citing *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 177 (2009)).

Defendant does not dispute the first two elements of Plaintiff's *prima facie* case: (1) that he belongs to a protected class of persons and (2) that he suffered an adverse employment action. *See* Doc. 19 at 9. Therefore, in order to establish his *prima facie* case, Plaintiff must show that he was qualified for his job and that he was replaced by someone younger. Based on the following reasons, Plaintiff has done so.

a. Whether Plaintiff Was Qualified

An ADEA plaintiff must show he is qualified for the job from which he was terminated. *See Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1432 (11th Cir. 1998). Plaintiff contends that he was qualified to do his job and that he thus satisfies the third prong. See Doc. 22 at 12-13. Defendant asserts that Plaintiff fails to establish a *prima facie* case of age discrimination because he cannot demonstrate that he was qualified for his job. In essence, Defendant argues that Plaintiff was not qualified because of the very activities that Defendant asserts caused it to terminate Plaintiff, including his smoking in the work area and his failure to discipline his subordinate employees that had also been smoking. *See* Doc. 24 at 2–5; Doc. 19 at 10. In support of its assertion, Defendant points to the testimony of Bart Sanders and the change of employee status form which outlined the reasons for Plaitniff's termination. *See* Doc. 19 at 10.

Plaintiff counters by proffering that he had "received a raise in the year prior to his promotion." Doc. 22 at 14. Plaintiff further asserts that Defendant allegedly treated comparators of Plaintiff differently. *See* Doc. 22 at 13. Specifically, citing to his own

testimony, Plaintiff claims that Kilpatrick, Plaintiff's former supervisor, permitted Plaintiff to smoke in the work area. See Doc. 22 at 15. Further, Plaintiff claims that Kenyatta Jones and Will Sanders both received favorable treatment from Defendant and that such treatment "contradicts SLC's argument on qualifications." Doc. 22 at 15. In other words, Plaintiff appears to argue that Defendant may not claim that he is unqualified for the job when it has inconsistently applied rules to his comparators.

In its response brief, Defendant concedes "that if Plaintiff had been performing the duties of his job, he would meet the burden of establishing he was qualified." Doc. 24 at 4. Defendant, however, contends that because Plaintiff testified that he smoked in the work area and did not discipline employees for doing the same, this court should find that Plaintiff was not qualified to do his job. Doc. 24 at 4–5. Lastly, in support of his argument, Defendant cites to Will Sanders's testimony that Plaintiff also failed to identify the other employees who smoked in the work area. Doc. 24 at 5.

The court concludes that Plaintiff has shown that he was qualified for his job at the time of his firing. In age discrimination cases, rather than alleged employee misconduct, the Eleventh Circuit focuses on a plaintiff's "skills and background to determine if they were qualified for a particular position." *Clark v. Coats & Clark,* 990 F.2d 1217, 1227 (11th Cir. 1993) (inferring a plaintiff's job qualifications based on his 25 years of experience); *see also Pace v. Southern Railway System,* 701 F.2d 1383, 1386 n.7 (11th Cir. 1983) (finding that "where a plaintiff has held a position for a significant period of time, qualification for that position, sufficient to satisfy a *prima facie* case, can be inferred"). Therefore, based on Plaintiff's employment history, the undersigned can infer that he was

qualified for his position. Plaintiff had been working at SLC since 1989 and, aside from one formal complaint, seemingly performed his job adequately. The Eleventh Circuit has also held that "allegations of poor performance against plaintiffs discharged from long-held positions may be properly considered, only *after* a *prima facie* case has been established, when a court evaluates the pretextual nature of an employer's proffered nondiscriminatory reasons for termination." *Damon v. Fleming Supermarkets Of Fla., Inc.*, 196 F.3d 1354, 1360 (11th Cir. 1999) (emphasis in original). As such, the court concludes that Plaintiff has shown that he is qualified for the position for purposes of his *prima facie* case.

b. Whether Menefee was Replaced by Someone Younger

Plaintiff contends that he was replaced by someone much younger and that he thus satisfies the fourth, and final, prong. Doc. 22 at 13-15. Defendant argues that because Plaintiff was not "replaced by someone outside the protected group[,]" Plaintiff is thus unable to establish a *prima facie* case. Doc. 19 at 11. Defendant's argument is inconsistent with Eleventh Circuit precedent on this issue. *See, e.g., Pace v. S. Ry. Sys.*, 701 F.2d 1383, 1390 (11th Cir. 1983) ("replacement by one within the protected category will not *preclude* proof of a *prima facie* case") (emphasis in original). Defendant argues that Plaintiff was replaced by Kilpatrick, "another Department Head, who is over the age of forty (40)." Doc. 19 at 11. Plaintiff counters by asserting that in actuality it was Bryan, "who was 22 years old," that replaced him. Doc. 22 at 15–16. Regardless, as Plaintiff suggests, the record supports this court's conclusion that Plaintiff has established the fourth prong of his *prima facie* case.

The Eleventh Circuit has held that a replacement who is only *three* years younger is sufficient to establish a *prima facie* case. *See Carter v. Decision One Corp.,* 122 F.3d 997, 1003 (11th Cir. 1997) (holding that a three year age difference met the "substantially younger" replacement requirement under ADEA) (citing *Carter v. City of Miami,* 870 F.2d 578, 582–83 (11th Cir. 1989)). Here, there is at least a 12 age year difference if it was Kilpatrick who replaced Plaintiff, and there is about a 40 year difference if it was Bryan who replaced him. The court does not need to resolve this factual dispute in order to find that Plaintiff has satisfied the final prong and has thus established a *prima face* case.

B. Legitimate, Non–Discriminatory Reasons for Plaintiff's Termination

To satisfy its burden of production under *McDonnell Douglas*, Defendant "need not persuade the court that it was actually motivated by the proffered reasons." *Combs v. Plantation Patterns,* 106 F.3d 1519, 1528 (11th Cir. 1997). Defendant only needs to put forth evidence that would allow a jury to conclude that the decision to fire Plaintiff was not motivated by discriminatory animus.

Bart Sanders testified that he fired Plaintiff because Plaintiff was found to be smoking in the work area, because he did not discipline subordinate employees for doing the same, and because he was "covering up for [those] hourly employees." Doc. 19-4 at 22; s*ee also* Doc. 19-2 at 2. Bart Sanders also cited to Plaintiff's 2008 disciplinary incident and the overall poor management of the slag department as factors relevant to the decision to terminate Plaintiff's employment. *See* Doc. 19-4 at 26.

Defendant meets its burden of production by providing multiple, legitimate, and non-discriminatory reasons for Plaintiff's termination. The burden now shifts back to Plaintiff to persuade the court that Defendant's proffered reasons are pretextual.

C. Plaintiff Attempts to Show that Defendant's Proffered Reasons are Pretextual

Plaintiff now bears the burden of persuading this court that Defendant's reasons are not legitimate because they are pretextual. "A reason is not pretext for discrimination 'unless it is shown both that the reason was false, and that discrimination was the real reason.'" *Brooks v. Cnty. Comm'n of Jefferson Cnty., Ala.*, 446 F.3d 1160, 1163 (11th Cir. 2006) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993)). Plaintiff must uncover "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [Defendant]'s proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs,* 106 F.3d at 1538. Plaintiff may not "recast [Defendant]'s proffered nondiscriminatory reasons or substitute his business judgment for [Defendant's]. Provided that the proffered reason[s] [are] one[s] that might motivate a reasonable employer, [Plaintiff] must meet" each of the proffered reasons "head on and rebut [them]." *Chapman,* 229 F.3d at 1030. Plaintiff contends that Defendant's reasons are pretextual for four primary reasons.[7] The court will discuss each reason in turn.

[7] Plaintiff also argues that a question of fact has been created because Bart Sanders did not initially cite Plaintiff's performance issues as a reason for his firing, and did not identify any other reasons except Plaintiff's own smoking. *See* Doc. 22 at 18 n.9. In fact, at the time of Plaintiff's firing, Defendant cited to Plaintiff's smoking and also that he was "caught covering for hourly employees smoking in work area by his own admission." Doc. 19-2 at 2. In his deposition, Bart Sanders testified that those were the reasons for Plaintiff's firing and added that Plaintiff's mismanagement, including the 2008 disciplinary incident, played a role in his firing. Doc. 19-4 at 22, 26. While Bart Sanders does cite to these two additional reasons

a. Whether Defendant Treated Younger Employees Differently

According to Plaintiff, Defendant's proffered reason, that Plaintiff was fired, at least in part, because he smoked in the work area, is pretextual. Plaintiff contends that Defendant's treatment of him suggests discrimination because it treated "substantially younger employee[s] who had been found smoking cigarettes" differently. Doc. 22 at 16. In support of his claim, Plaintiff cites, generally, to a summary chart of purported comparators that were treated differently. *See* Doc. 22 at 17; *see also* Doc. 23-9. In addition to the chart of supposed comparators, Plaintiff also appears to identify by name two potential comparators, Will Sanders and Kenyatta Jones, who committed similar or very serious dissimilar conduct but were not terminated because they were substantially younger than Plaintiff. Doc. 22 at 16-17, 19-20.

Plaintiff has failed to identify proper comparators. "A relevant comparator is an employee who is similarly situated to the plaintiff" in all pertinent aspects. *See Horn v. United Parcel Servs., Inc.*, 433 F. App'x. 788, 793 (11th Cir. 2011). In order to conclude whether a comparator is similarly situated, the Eleventh Circuit determines whether the employees are involved in similar conduct and are treated differently. *Id.* at 792–93. "And '[w]hen making that determination, we require that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing

in his deposition, this fact does not indicate an inconsistency nor a contradiction that may evidence pretext. *See Ritchie v. Indus. Steel, Inc.*, 426 F. App'x. 867, 872 (11th Cir. 2011) ("[T]he fact that the employer offers an additional reason for the employment decision does not suggest pretext if both of the employer's reasons are consistent.").

employers' reasonable decisions.'" *Id.* at 793 (quoting *Burke-Fowler v. Orange Cnty.*, 447 F.3d 1319, 1323 (11th Cir. 2006).

The court first considers Plaintiff's assertion that numerous employees he identifies in a "Comparator Chart" are proper comparators because they were disciplined for alleged similar misconduct, including smoking in the workplace. In particular, Plaintiff identifies four employees from the chart who "had multiple major infractions within a 12 month period which, under SLC's policy should have resulted in termination, but the employee's [sic] were not terminated." Doc. 22 at 17 n.10. Plaintiff's "Comparator Chart" is completely devoid of citations but is purportedly supported by records contained somewhere within an over 600 page submission of personnel records. *See* Doc. 23-9; *see also* Docs. 23-10 & 23-11. The court will not comb through these records, many of which are illegible, in order to locate foundational support for the summary chart. *See Bailey v. Baldwin Cty. Bd. of Educ.*, 2016 WL 80662, at *12 n.1 (S.D. Ala. Jan. 6, 2016) ("The Court will not scour uncited portions of those exhibits seeking out evidentiary nuggets that might aid one side or the other."; *See also* Fed. R. Civ. P. 56(c)(3) (in ruling on a summary judgment motion, "[t]he court need consider only the cited materials" in the record). Nevertheless, the court has still considered whether the cited employees—including the four specifically named in Plaintiff's brief—are proper comparators and determined that they are not.

Plaintiff does not indicate that any employee listed in his Chart, including the four he describes as having "multiple major infractions within a 12 month period," was, like him, a Department Manager. This is salient because, "[a]lthough a comparator need not

have the same job title as the plaintiff to be a sufficient comparator, material differences in 'ranks and responsibilities' may render any comparison impossible without 'confusing apples and oranges.'" *Horn*, 433 F. App'x at 793 (citing *Rioux v. City of Atlanta*, 520 F.3d 1269, 1280-81 (11th Cir. 2008)). Bart Sanders testified that, due to the higher expectations accommodating their positions, Defendant holds management to a higher standard of conduct. Doc. 23-8 at 26. As such, non-managers guilty of similar misconduct as a manager are not properly viewed as a comparator for a manager. Furthermore, Plaintiff's misconduct went beyond mere smoking, like most of the employees listed on Plaintiff's "Comparator Chart." Plaintiff was also terminated for failing to discipline his subordinates and for refusing to identify to his superiors the subordinate employees that he knew had been smoking in the workplace. Indeed, if anything, Plaintiff's "Comparator Chart" listing dozens of employees caught smoking cigarettes or marijuana at work actually illustrates how pervasive the problem of workplace smoking was at SLC and, therefore, why Defendant reasonably considered a manager's contribution to and aggravation of the problem in multiple ways to be especially problematic. Hence, because the employees listed in the "Comparator Chart" were not guilty of similar, nearly identical conduct as Plaintiff, they are not proper comparators for purposes of showing pretext. *See Horn*, 433 F. App'x. at 793.

Plaintiff also appears to argue that Will Sanders is a viable comparator because "when he engaged in conduct, discharging a loaded firearm in the building, that warranted immediate termination[,]" he was not so terminated. Doc. 19 at 15. Obviously, in bringing a firearm to work and allowing it to discharge, Will Sanders did not commit misconduct

similar to Plaintiff. Nevertheless, to the extent that it may be argued that, objectively, Will Sanders's misconduct was more serious than Plaintiff's because of its potential ramifications, yet he was not terminated, it still does not follow that Will Sanders is a proper comparator.

The undisputed facts show that Will Sanders remained employed at Sanders Lead Company not because of his younger age relative to Plaintiff, but because of simple nepotism. Will Sanders is the son of Bart Sanders, and Bart Sanders declined to terminate his son because he loves his son and did not want to terminate him. Doc. 24-2 at 4. While nepotism may be viewed as a patently unfair basis for disparate treatment in the workplace, it does not, alone, permit the inference that Plaintiff was discriminated against on the basis of his age. Indeed, without a showing that the nepotism that favored Will Sanders worked to the disadvantage of only those persons in Plaintiff's protected class, rather than employees both within and without the protected class of the ADEA, the court cannot conclude that Defendant's treatment of Will Sanders evidences pretext. *See, e.g., Thompson v. Baptist Hosp. of Miami, Inc.*, 279 F. App'x 884, 888 (11th Cir. 2008).

Finally, Plaintiff appears to argue that Kenyatta Jones is a comparator to Plaintiff because, although he was a "supervisor who had been found smoking on property and later permitted employees to smoke," he was "substantially younger" than Plaintiff and not terminated by SLC. Doc. 22 at 19-20. However, the court cannot conclude that Jones is a viable comparator for Plaintiff. First, although Plaintiff describes him as a "supervisor," Defendant has produced evidence that, unlike Plaintiff, Jones was not a department manager and was, instead, a "foreman" in the "hammer mill." Doc. 24 at 16. This alone

distinguishes Jones considering the court's previous discussion of SLC's elevated expectations for its management-level employees. Furthermore, it does not appear from Plaintiff's "Comparator Chart" that Jones not only allowed others to smoke, but also that he failed to reveal the identities of other employees who were smoking when asked to do so by management, as had Plaintiff. As such, Jones simply is not a viable comparator to Plaintiff for the purpose of showing pretext.

For all of the foregoing reasons, Plaintiff has failed to put forward a viable comparator for the purpose of showing that Defendant's proffered reasons for his termination are pretextual.

b. Whether Defendant's Alleged Departure From Policy Indicates Pretext

In support of its contention that Defendant deviated from its policy, Plaintiff provides little more than a few conclusory statements. *See* Doc. 22 at 17–18. Plaintiff claims that "[d]efendant deviated not only from its disciplinary policy by imposing a harsher penalty on Mr. Menefee that the policy directed, but also it deviated from its standard practice of running terminations by Human Resources." Doc. 22 at 19. In support, Plaintiff points the court to the testimony of Jim Roach, SLC's Human Resources director, "that deviation from policy is a red flag for discrimination."[8] Doc. 22 at 17-18.

Certainly, an employer's departure from its disciplinary policy may evidence pretext. *See Veasy v. Sheriff of Palm Beach Cty.*, 2018 WL 3868674, at *3 (11th Cir. Aug.

[8] After a diligent search through the record, the court could not find any deposition of Roach.

14, 2018) (quoting *Morrison v. Booth*, 763 F.2d 1366, 1374 (11th Cir. 1985)). Plaintiff has not established that Defendant has departed from its policy because Defendant's stated reasons can, pursuant to Defendant's employee handbook, result in termination. *See* Doc. 19-4 at 19–21; *see also Mitchell v. USBI Co.,* 186 F.3d 1352, 1355–56 (11th Cir.1999) ("Standing alone, deviation from a company policy does not demonstrate discriminatory animus."). Further, according to Bart Sanders, Roach *did* participate in considering whether Defendant should terminate Plaintiff's employment or not. *See* Doc. 23-8 at 44. Defendant's policy also allows for discretion in the administration of penalties, though not when applied to intolerable offenses. *See* Doc. 23-8 at 18. And when a disciplinary policy permits discretion, "[a]n employer's failure to follow that policy . . . does not show pretext." *Coleman v. Alabama State Univ.*, 904 F. Supp. 2d 1245, 1259 (M.D. Ala. 2012) (quoting *Ritchie,* 426 F. Appx. at 873). For these reasons, Plaintiff is unable to show pretext based on a purported deviation from Defendant's disciplinary policy.

c. Whether Bart Sanders's Alleged Comments Imply Pretext

Plaintiff also contends that Bart Sanders's comments asking him about his age, when coupled with Defendant's deviation from its disciplinary policy, indicate discrimination. *See* Doc. 22 at 18. Plaintiff avers that on the day of his termination, October 1, 2015, Bart Sanders asked him how old he was. Doc. 23-1 at 52. Plaintiff also testified, without providing dates, that Bart Sanders asked him about his age "several times previous to that." Doc. 23-1 at 52. While an employer's discriminatory remarks may evidence pretext, stray remarks may not. *Compare Damon,* 196 F.3d at 1362 (holding that an employer's comment that he wanted "aggressive, young men" to be promoted was

evidence of age discrimination) *with Ritchie v. Inustrial Steel, Inc.*, 426 F. App'x 867, 872-73(11th Cir. 2011) (supervisors' "various derogatory comments" about the plaintiff's age, including calling him "old man," were insufficient to show pretext because they were not linked to any decision to terminate his employment). Here, even if Plaintiff was asked his age on the day of his termination and on a few unspecified prior occasions, he has produced no evidence showing that the decisionmakers were preoccupied with his age, or that they ever "expressed a preference for younger employees or believed that [Plaintiff] could not perform the job because of his age." *Ritchie*, 426 F. App'x at 874. Given that Plaintiff has produced no other compelling evidence tending to show that his age had anything to do with his termination or any other employment action, the court finds it is not reasonably inferable merely from Bart Sanders asking Plaintiff his age that the decision to terminate Plaintiff was the product of ageism.

d. Whether Plaintiff's Alleged Poor Performance Signals Pretext

Plaintiff argues that, given his good performance record, Defendant's reference to his poor management as a factor that led to the firing indicates pretext. *See* Doc. 22 at 20–21. In support, Plaintiff, while acknowledging the documented 2008 incident, cites to the lack of documentation showing his apparently poor management. Doc. 22 at 20–21. However, in order to show pretext, Plaintiff must do more than merely show that his performance was, in fact, satisfactory. *See Ritchie*, 426 F. App'x. at 872 ("[w]hen an employer asserts that it fired the plaintiff for poor performance, it is not enough for the plaintiff to show that his performance was satisfactory."). Rather, Plaintiff must show that Defendant did not actually consider him to have poor management of his department, and

that, in actuality, used that reason as pretextual cover for discriminating against him due to his age. *Id.* (citing *Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1266 (11th Cir. 2010)). Because Plaintiff has failed to produce other significant, compelling evidence of pretext, Plaintiff's quibbling over whether his performance was actually satisfactory to Defendant is insufficient to show pretext.

e. Summary

Even construing them in a light most favorable to Plaintiff, based on all of the forgoing reasons, the facts do not persuade this court that Defendant's proffered reasons are pretext. Furthermore, Plaintiff's failure to even acknowledge, much less rebut head on, one of Defendant's proffered reasons for his termination (that Plaintiff was fired for covering-up for and failing to identify the hourly employees that smoked), is, in itself, reason enough for this court to find that Plaintiff has not met his burden at the pretext stage of the analysis. Thus, the court concludes that Defendant is entitled to summary judgment as to all of Plaintiff's claims and that the claims are due to be dismissed.

CONCLUSION AND ORDER

For the foregoing reasons, it is ORDERED as follows:

(1) Defendant's motion for summary judgment, *see* Doc. 19, is GRANTED, and summary judgment is hereby entered in defendant's favor on all claims.

(2) The Clerk of Court is DIRECTED to close this case.

A separate final judgment will be entered.

DONE this 7th day of January, 2019.

/s/ Wallace Capel, Jr.
CHIEF UNITED STATES MAGISTRATE JUDGE